

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	CG Docket No. 02-278
Petitioner of Financial Carrier Services, Inc.)	
For Retroactive Waiver)	CG Docket No. 05-338
OF 47 C.F.R. §64.1200(a)(4)(iv))	

PETITION FOR RETROACTIVE WAIVER

Pursuant to Section 1.3 of the Commissions’ Rules, 47 C.F.R. § 1.3, and Paragraph 30 of the Commission’s Order, CG Docket Nos. 02-278, 05-338, FCC 14-164 (rel. Oct. 30, 2014), Petitioner Financial Carrier Services, Inc. (“Petitioner” or “FCS”), through its attorneys, respectfully requests that the Commission grant a retroactive waiver of the opt-out notice requirement in Section 64.1200(a)(4)(iv) of its rules.

I. INTRODUCTION & BACKGROUND

FCS is a corporation headquartered in Broward County, Florida that offers factoring services to trucking companies.¹ FCS has sales agents who target asset-based trucking companies and inform them of FCS’s services.² It is FCS’s general policy to first call potential trucking company customers and, after obtaining their consent, either fax or e-mail the trucking companies additional information.³

As the Commission is aware, opportunistic plaintiff attorneys are frequently filing putative class action lawsuits seeking windfall recoveries for alleged violations of the Telephone Consumer Protection Act’s (the “TCPA”) prohibition on sending unsolicited facsimile advertisements. These putative class action lawsuits oftentimes expose businesses to millions, if not billions, of dollars in liability for purported violations of the TCPA that, at best, have a

¹ Declaration of Derek T. Skea, at ¶ 3, dated April 7, 2015, attached hereto as Exhibit 1 (“Skea Declaration”).

² *Id.* at ¶ 4.

³ *Id.* at ¶ 5.

minimal effect on the recipient of the facsimile advertisements. The named plaintiffs in such cases often participate in name only, deferring entirely to their respective counsel in the hopes of gaining some monetary award to compensate them for the nuisance of receiving a facsimile. The plaintiff attorneys, however, reap a windfall in attorney fees and costs, in part, for the failure of the businesses to provide opt-out notice on facsimiles that their customers have consented to receive.

FCS is currently defending one such TCPA lawsuit in the United States District Court for the Northern District of Illinois, Case No. 15-cv-00765.⁴ The TCPA lawsuit in which FCS is currently defending alleges that Plaintiff received one unsolicited facsimile from FCS in April 2014. In seeking to represent a nationwide putative class of individuals and entities, Plaintiff alleges that FCS “transmitted as part of a mass broadcasting, or “blast,” of faxes.”⁵ Since receipt of the class action complaint in the Northern District of Illinois FCS has revised its facsimiles to comport with the specific requirements of 47 CFR 64.1200(a)(4).⁶

This petition does not seek to have the Commission determine the merit, propriety or truthfulness of Plaintiff’s claims and allegations or FCS’s defenses, such as whether Plaintiff or any other of the putative class members invited or consented to receive the purported facsimiles at issue, whether an established business relationship existed, or whether the purported facsimiles at issue are “advertisements” as contemplated by the TCPA. Such determinations are properly left to the consideration of the district court. Rather, FCS seeks only a limited retroactive waiver from 47 C.F.R. § 64.1200(a)(4)(iv) consistent with the retroactive waivers that the Commission has provided to other similarly situated entities.

A. The Telephone Consumer Protection Act and the Commission’s Regulations

⁴ *Id.* at ¶ 6.

⁵ *See* Ex. 2 at ¶ 21.

⁶ Skea Declaration at ¶ 9.

The Telephone Consumer Protection Act (“TCPA”) prohibits the use of any telephone, facsimile machine, computer, or other device to send an “unsolicited advertisement” to a facsimile machine. 47 U.S.C. §227(b)(1)(C). The TCPA was amended in 2005 by the Junk Fax Prevention Act (“JFPA”). *See* Junk Fax Prevention Act of 2005, Pub. L. no. 109-21, 119 Stat. 359 (2005). Relevant to the issues raised herein, the JFPA codified an exception to the prohibition for companies that send facsimile advertisements to those individuals and entities with whom the companies have an established business relationship. *See* 47 U.S.C. § 227(b)(1)(C)(i).

The Commission amended the rules concerning fax transmission to reflect the changes brought about by the JFPA. *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Junk Fax Prevention Act of 2005*, CG Docket Nos. 02-278 & 05-338, Report and Order and Third Order on Reconsideration, 21 FCC Rcd. 3787 (2006) (the “Junk Fax Order”). The Junk Fax Order adopted a rule stating that a facsimile advertisement “sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements in paragraph (a)(4)(iii) of this section.” 47 C.F.R. § 64.1200(a)(4)(iv). However, the Junk Fax Order also contained a footnote that further stated “the opt-out notice requirements only applies to communication that constitute *unsolicited* advertisements.” Junk Fax Order, 21 FCC Rcd. at 3810, fn. 154. (Emphasis added).

B. The Commission’s October 30, 2014, Order

On October 30, 2014, the Commission issued Order FCC 1-164 (the “Oct. 30 Order”) regarding the requirement that opt-out notices be provided on facsimile advertisements, confirming the rules adopted by the Junk Fax Order, regardless of whether the recipient had consented to receiving the facsimile. In addition to its findings, and of paramount importance to

this petition, the Commission granted retroactive waivers of the opt-out requirement to the petitioners to provide “temporary relief from any past obligation to provide the opt-out notice to such recipients required by [the Commission’s] rules.” Oct. 30 Order, ¶ 1.

Specifically, two factors were instrumental to the Commission’s determination to grant the retroactive waivers. First, the Commission noted the language in a footnote in the Junk Fax Order which stated that “the opt-out notice requirement only applies to communications that constitute *unsolicited* advertisements.” Junk Fax Order, 21 FCC Rcd. at 3810, fn. 154; Oct. 30 Order ¶ 24. Second, the Commission noted the “lack of explicit” notice regarding the new opt-out requirement on facsimile advertisements transmitted with the prior consent of the recipient. Oct. 30 Order ¶ 25. Because confusion resulted from these two special circumstances, the Commission found good cause to grant the retroactive waivers of the rule enunciated in the Junk Fax Order, stating:

The record indicates that inconsistency between a footnote contained in the *Junk Fax Order* and the rule caused confusion or misplaced confidence regarding the applicability of this requirement to faxes sent to those recipients who provided prior express permission.

* * *

Further, some commenters question whether the Commission provided adequate notice of its intent to adopt section 64.1200(a)(iv). Although we find the notice adequate to satisfy the requirements of the Administrative Procedure Act, we acknowledge that the notice provided did not make explicit that the Commission contemplated an opt-out requirement on fax ads sent with the prior express permission of the recipient.

* * *

We find that this specific combination of factors presumptively establishes good cause for retroactive waiver of the rule.

Oct. 30 Order, ¶¶ 24-26.

Given the lack of explicit notice and the contradictory footnote, the Commission found that there was a “confusing situation for businesses” which “left some business potentially

subject to significant damage awards under the TCPA's private right of action or possible Commission enforcement." Oct. 30 order, ¶ 27. Accordingly, the Commission recognized that the TCPA's legislative history makes clear our responsibility to balance legitimate business and consumer interests[.]" and determined that granting the requested retroactive waivers would serve the public interest. *Id.*

After granting the retroactive waiver to the petitioning parties, the Commission stated that "[o]ther, similarly situated parties may also seek waivers such as those granted in this Order." Oct. 30 Order, ¶ 30. The Commission directed that parties making similar waiver requests make every effort to file within six months of the release of the Oct. 30 Order. *Id.*

II. FCS IS SIMILARLY SITUATED AND RESPECTFULLY REQUESTS A RETROACTIVE WAIVER OF THE OCT. 30 ORDER

A. The Allegations in the TCPA Lawsuit Against FCS

As stated, FCS is a defendant in a putative class action lawsuit alleging violations of the TCPA, which is currently pending in the United States District Court for the Northern District of Illinois, *Grok Lines, Inc. v. Financial Carrier Services, Inc. and Electronic Funds Source, LLC*, Case No. 15-cv-00765 (the "Litigation"). *See* Exhibit A to Skea Declaration. The Plaintiff in the Litigation seeks to recover damages on behalf of itself and all others similarly situated on the grounds that FCS allegedly sent facsimile transmission in violation of the TCPA. Specifically, plaintiff has alleged, in part, that the subject facsimiles do not contain opt-out notices that comply with the TCPA. Plaintiff seeks to recover on behalf of all persons or entities that have received unsolicited faxes. In the alternative, Plaintiff seeks to recover on behalf of all persons or entities that have received faxes that did not contain the opt-out notice. However, FCS will assert in the Litigation that it is not liable under the TCPA because, among other reasons, the members of the putative class consented to receiving the alleged facsimiles.

B. Good Cause Exists to Grant FCS a Waiver in these Circumstances

Under section 1.3 of the Commission's rules, the Commission may suspend, revoke, amend, or waive any of its rules at any time "for good cause shown." 47 C.F.R. § 1.3; *see also* Oct. 30 Order, ¶ 23; *Northeast Cellular Tel. Co. v. FCC*, 897 F. 2d 1164, 1166 (D.C. Cir. 1990). In addition to "good cause shown," waiver also requires the Commission find that a waiver is in the public interest. *See* Oct. 30 Order, ¶ 23; *see also Northeast Cellular Tel. Co.*, 897 F. 2d at 1166 ("The FCC may exercise its discretion to waive a rule where particulate facts would make strict compliance inconsistent with the public interest."). The Commission has already determined that both of these requirements are satisfied in the context of the rule applying the opt-out notice requirement to solicited facsimiles. *See* Oct. 30 Order, ¶ 26-27.

C. FCS is Similarly Situated to Parties Granted Waiver By the Oct. 30 Order

FCS is similarly situated to the parties that were granted retroactive waivers by the Oct. 30 Order. In the Litigation, FCS is alleged to have sent unsolicited facsimile transmissions that did not contain proper opt-out notices. FCS contends that such facsimiles were sent with the prior consent of the recipients.⁷ FCS did not understand and was reasonably uncertain whether the opt-out requirement applied to solicited facsimiles.⁸ In short, as with the parties that were granted waivers by the Oct. 30 Order, FCS finds itself potentially subject to significant liability, as well as the costs of litigation, based on the application of a provision of the Junk Fax Order, regarding which the Commission has recognized there was confusion. Indeed, if Plaintiff in the Litigation is successful in obtaining class certification and FCS is found liable to have violated

⁷ Skea Declaration at ¶ 7.

⁸ *Id.* at ¶ 8.

the TCPA, FCA's potential liability would substantially exceed its net worth and annual sales, thereby forcing FCS out of business.⁹

D. A Limited Retroactive Waiver is Appropriate

The Commission may granted a waiver where, as here, the underlying purpose of the rule would not be served or would be frustrated by application in the instant case, and granting the waiver would be in the public interest. 47 C.F.R. §1.925(b)(3)(i). The Commission may also grant a waiver where, under the factual circumstances, application of the rule would be inequitable, unduly burdensome or contrary to the public interest. 47 C.F.R. § 1.925(b)(3)(ii); *see also* 47 C.F.R. § 1.3 (the Commission may waive any provision of its rules for good cause shown, at any time); *Keller Commc'ns, Inc. v. F.C.C.*, 130 F.3d 1073, 1076 (D.C. Cir. 1997) ("The Commission may waive its rules if particular facts would make strict compliance inconsistent with the public interest.") (internal quotations omitted).

Here, the underlying purpose of the Rule would not be served by applying the subject opt-out requirement to Petitioner. The stated purpose of Section 64.1200 is to allow consumers to stop unwanted faxes. This purpose would not be furthered by subjecting Petitioner to potentially significant liability for facsimile transmissions that did not contain proper opt-out notices where the recipients had provided prior express permission to receive such faxes and there was confusion regarding whether the opt-out requirement applied to such faxes.

Additionally, granting a limited and retroactive waiver to Petitioner would serve the public interest. The factors that weighed in favor of granting a retroactive waiver to the parties addressed by the Oct. 30 Order are similarly applicable here. Specifically, the confusing nature of the contradictory footnote and lack of explicit notice have yielded a situation in which

⁹ *Id.* at ¶ 10.

Petitioner may be exposed to significant liability, even though Petitioner believed it was complying with the TCPA.

For the same reasons, under these unique factual circumstances, requiring application of 47 C.F.R. §64.1200(a)(4)(iv) to Petitioner would be inequitable.

Petitioner therefore respectfully requests a retroactive waiver of liability under the TCPA and the FCC's regulations and orders relating to facsimiles transmissions sent to recipients who had provided prior express invitation or permission to receive such faxes, but where such faxes did not contain opt-out notices in compliance with Section 64.1200(a)(4)(iii) and (iv).

Petitioner understands and appreciates the importance of complying with the Commission's rules, including the Junk Fax Order as clarified by the Oct. 30 Order, and has implemented procedures to ensure compliance going forward.

Date: April 7, 2015

Respectfully submitted

FINANCIAL CARRIER SERVICES, INC.

s/Beth-Ann Krinsky

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Its Attorneys

Exhibit 1

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	CG Docket No.
Petitioner of Financial Carrier Services, Inc.)	
For Retroactive Waiver)	
OF 47 C.F.R. §64.1200(a)(4)(iv))	

DECLARATION OF DEREK SKEA

Pursuant to 28 U.S.C. § 1746, I, Derek Skea, declare as follows:

I am a resident of the state of Florida. I have personal knowledge of the facts stated in this declaration and, if called as a witness, could and would testify competently to them.

I am the President of Petitioner Financial Carrier Services, Inc. ("FCS"). I have worked with FCS since 2011.

FCS is a corporation that offers factoring services to trucking companies headquartered in Broward County, Florida.

FCS has sales agents who call companies and inform them of FCS's services.

With the companies' consent the agents fax additional information to them.

FCS was recently sued for purported violations of the TCPA, including the failure to include a proper opt out notice on the faxes. A copy of the Complaint is attached as Exhibit A hereto.

FCS contends that such facsimiles were sent with the prior consent of the recipients.

FCS did not understand and was reasonably uncertain whether the opt-out requirement applied to solicited facsimiles.

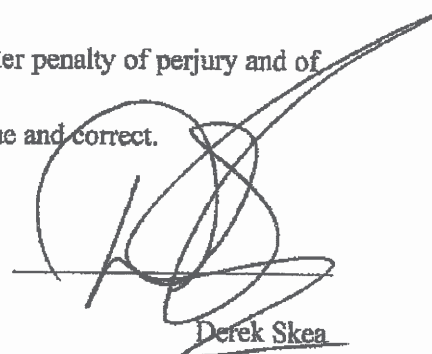
Since being sued in the Northern District of Illinois, Case No. 15-cv-00765, in which Plaintiff alleges that FCS did not comply with the TCPA's opt out notice requirement, FCS has revised its facsimiles to read as follows:

If you no longer wish to receive faxes from Financial Carriers Services, Inc., you may request that we not send faxes to your telephone fax machine(s). In order for your request to be valid, (i) the request must clearly identify the fax number(s) to which the request relates; (ii) the request must be communicated to us by calling 866-899-7080 or by sending a fax to 888-295-5256; and (iii) you must not have subsequently provided express permission, whether written or unwritten, to us to transmit faxes to the fax number(s) identified in the request. Our failure to comply with a proper request within 30 days is unlawful.

If Plaintiff is successful in obtaining class certification and FCS is found to have violated the TCPA, FCS's potential liability would substantially exceed its net worth and annual gross sales, thereby forcing FCS out of business.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury and of the laws of the United States that the foregoing is true and correct.

Executed this 7th day of April, 2015.



Derek Skea

Exhibit A

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

GROK LINES, INC., an Illinois
corporation, individually and on behalf
of all others similarly situated,

Plaintiff,

v.

FINANCIAL CARRIER SERVICES,
INC., a Florida corporation, and
ELECTRONIC FUNDS SOURCE,
LLC, a Utah limited liability company,

Defendants.

Case No. 15-cv-765

JURY TRIAL DEMANDED

CLASS ACTION COMPLAINT

Plaintiff Grok Lines, Inc. ("Plaintiff") brings this Class Action Complaint against Defendants Financial Carrier Services, Inc. ("FCS"), and Electronic Funds Source, LLC ("EFS") (collectively, "Defendants"), on behalf of itself and all others similarly situated, and complains and alleges upon personal knowledge as to itself and its own acts and experiences, and, as to all other matters, upon information and belief, including investigation conducted by its attorneys.

I. NATURE OF THE ACTION

1. FCS is a corporation that offers factoring services to trucking companies. EFS is a company that provides purchase and payment management services. In an effort to market their products and services, Defendants sent unsolicited junk faxes in bulk – "fax blasts" – to unwilling recipients with deficient opt-out notices. Fax advertising shifts the cost of the marketing promotion from the marketer – the sender of the fax – to the unwilling recipient, and is expressly prohibited by the Telephone Consumer Protection Act, 47 U.S.C. §227, *et seq.* ("TCPA").

2. Neither Plaintiff nor the other Class members ever consented, authorized, desired or permitted Defendants to send them faxes.

3. In order to redress these injuries, Plaintiff seeks an injunction requiring Defendants to cease all unsolicited faxing and deficient opt-out notice activities, an award of statutory damages to the Class members under the TCPA, and an award of damages for conversion, together with costs and attorneys' fees.

II. JURISDICTION AND VENUE

4. This Court has original jurisdiction over Counts I and II pursuant to 28 U.S.C. § 1331 because they arise under the laws of the United States.

5. This Court has supplemental jurisdiction over Count III pursuant to 28 U.S.C. § 1367 because Defendant's conduct – giving rise to Counts I and II – forms part of the same case or controversy.

6. Further, this Court has diversity jurisdiction under 28 U.S.C. § 1332(d) because (a) at least one member of the putative class is a citizen of a State different from Defendants, (b) the amount in controversy exceeds \$5,000,000, exclusive of interest and costs, and (c) none of the exceptions under that subsection apply to this action.

7. This Court has personal jurisdiction over Defendants under 735 ILCS 5/2-209, because a substantial portion of the wrongdoing alleged in this Complaint took place in or was directed toward the State of Illinois. Defendants, by sending junk faxes in bulk into this State soliciting business, have sufficient contacts in this State to render the exercise of jurisdiction by this court permissible.

8. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) because a substantial part of the events giving rise to the claim occurred in this District.

III. PARTIES

Plaintiff

9. Plaintiff is a corporation organized in and existing under the laws of the State of Illinois with its principal place of business in Cook County, Illinois. For purposes of 28 U.S.C. § 1332, Plaintiff is a citizen of the State of Illinois.

Defendants

10. FCS is a corporation organized in and existing under the laws of the State of Florida with its principal place of business in Broward County, Florida. For purposes of 28 U.S.C. § 1332, FCS is a citizen of the State of Florida.

11. EFS is a limited liability company organized in and existing under the laws of the State of Utah with its principal place of business in Salt Lake City County, Utah.

12. On information and belief, EFS has two members:

a. WP Mustang Holdings, LLC, which has one member:

i. Scott R. Phillips, who is a citizen of the State of Tennessee; and

b. WP Mustang Sub, LLC, which has one member:

i. Scott R. Phillips, who is a citizen of the State of Tennessee.

13. For purposes of 28 U.S.C. § 1332, EFS is a citizen of the State of Tennessee.

IV. FACTUAL BACKGROUND

14. On or about April 11, 2014, Plaintiff received the unsolicited fax advertisement attached as Exhibit A. Discovery may reveal the transmission of additional faxes.

15. The fax does not satisfy the opt-out notice requirements under 47 U.S.C. § 227(b)(2)(D). The fax fails to contain a clear and conspicuous notice on the first page stating that the recipient may make a request to the sender not to send any future unsolicited advertisements

and that failure to comply within a reasonable time is unlawful, as required by §§ 227(b)(2)(D)(i) and (ii). Additionally, the fax fails to contain a notice that sets forth the requirements for a request under § 227(b)(2)(E), as required by § 227(b)(2)(D)(iii).

16. The fax advertises FCS' factoring service and twelve other services and programs that FCS offers as part of its factoring service. In addition, the fax contains an application for FCS' factoring service.

17. In addition, the fax advertises EFS' Financial Carrier Service Fuel Card program.

18. Defendants sent the fax jointly and/or are responsible jointly, as a matter of law, for the actions of the individuals who sent the fax.

19. Defendants' products and services were advertised in the fax, and Defendants derived an economic benefit from the transmission of the fax.

20. Plaintiff had no prior relationship with Defendants and did not consent to the receipt of the above-referenced (or any) fax advertisements from Defendants

21. On information and belief, the fax attached as Exhibit A was transmitted as part of a mass broadcasting, or "blast," of faxes.

22. There is no reasonable means by which Plaintiff and Class members can avoid receiving unsolicited and unlawful faxes.

V. CLASS ALLEGATIONS

23. Plaintiff brings Counts I and III, as set forth below, on behalf of itself and as a class action pursuant to the provisions of Rules 23(a), (b)(2), and (b)(3) of the Federal Rules of Civil Procedure on behalf of a class defined as:

Unsolicited Fax Class ("Class One")

All individuals or entities in the United States who received one or more unsolicited facsimile advertisements from or on behalf of

Defendants Financial Carrier Services, Inc. and Electronic Funds Source, LLC.

Excluded from Class One are: Defendants and their subsidiaries and affiliates; all persons who make a timely election to be excluded from Class One; governmental entities; and the judge to whom this case is assigned and any immediate family members thereof.

24. Plaintiff brings Count II, as set forth below, on behalf of itself and as a class action pursuant to the provisions of Rules 23(a), (b)(2), and (b)(3) of the Federal Rules of Civil Procedure on behalf of a class defined as:

Opt-out Notice Class ("Class Two")

All individuals or entities in the United States who received one or more facsimile advertisements from or on behalf of Defendants Financial Carrier Services, Inc. and Electronic Funds Source, LLC with opt-out notices that do not comply with 47 U.S.C. § 227(b)(2)(D).

Excluded from Class Two are: Defendants and their subsidiaries and affiliates; all persons who make a timely election to be excluded from Class Two; governmental entities; and the judge to whom this case is assigned and any immediate family members thereof.

25. "Class members" or "the Class" refer to both Class One and Class Two, unless otherwise stated.

26. Certification of Plaintiff's claims for class-wide treatment is appropriate because Plaintiff can prove the elements of its claims on a class-wide basis using the same evidence as would be used to prove those elements in individual actions alleging the same claims.

27. **Numerosity – Federal Rule of Civil Procedure 23(a)(1).** The members of the Class are so numerous that individual joinder of all Class members is impracticable. On information and belief, there are thousands of consumers and recipients who have been damaged by Defendants' wrongful conduct as alleged herein. The precise number of Class members and

their addresses is presently unknown to Plaintiff, but may be ascertained from Defendants' and records. Class members may be notified of the pendency of this action by recognized, Court-approved notice dissemination methods, which may include U.S. mail, electronic mail, Internet postings, and/or published notice.

28. Commonality and Predominance – Federal Rule of Civil Procedure 23(a)(2) and 23(b)(3). This action involves common questions of law and fact, which predominate over any questions affecting individual Class members, including, without limitation:

- a. whether Defendants engaged in a pattern of sending unsolicited fax advertisements as alleged herein;
- b. the manner in which Defendants compiled or obtained their list of fax numbers;
- c. whether Defendants violated the TCPA;
- d. whether Plaintiff and the Class members had a right to the use of their fax machines;
- e. whether Defendants wrongfully assumed control over Plaintiff's and the Class members' fax machines;
- f. whether Defendants converted to their own use Plaintiff's and the Class members' fax machines;
- g. whether Plaintiff and the Class are entitled to actual, statutory, or other forms of damages, and other monetary relief and, in what amount(s);
- h. whether Plaintiff and the Class are entitled to treble damages based on the willfulness of Defendants' conduct; and
- i. whether Plaintiff and the Class are entitled to equitable relief, including but not limited to injunctive relief and restitution.

29. Typicality – Federal Rule of Civil Procedure 23(a)(3). Plaintiff's claims are typical of the other Class members' claims because, among other things, all Class members were comparably injured through the uniform prohibited conduct described above.

30. Adequacy of Representation – Federal Rule of Civil Procedure 23(a)(4).

Plaintiff is an adequate representative of the Class because its interests do not conflict with the interests of the other Class members it seeks to represent; it has retained counsel competent and experienced in complex commercial and class action litigation; and Plaintiff intends to prosecute this action vigorously. The interests of the Class members will be fairly and adequately protected by the Plaintiff and its counsel.

31. Declaratory and Injunctive Relief – Federal Rule of Civil Procedure 23(b)(2).

Defendants have acted or refused to act on grounds generally applicable to Plaintiff and the other Class members, thereby making appropriate final injunctive relief and declaratory relief, as described below, with respect to the Class as a whole.

32. Superiority – Federal Rule of Civil Procedure 23(b)(3). A class action is superior to any other available means for the fair and efficient adjudication of this controversy, and no unusual difficulties are likely to be encountered in the management of this class action. The damages or other financial detriment suffered by Plaintiff and the other Class members are relatively small compared to the burden and expense that would be required to individually litigate their claims against Defendants, so it would be impracticable for Class members to individually seek redress for Defendants' wrongful conduct. Even if Class members could afford individual litigation, the court system could not. Individualized litigation creates a potential for inconsistent or contradictory judgments, and increases the delay and expense to all parties and the court system. By contrast, the class action device presents far fewer management difficulties, and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court.

V. CLAIMS ALLEGED

COUNT I

Violation of the TCPA, 47 U.S.C. § 227
(On Behalf of Class One)

33. Plaintiff incorporates by reference paragraphs 1-32 as if fully set forth herein.

34. Defendants and/or their agents used a telephone facsimile machine, computer or other device to send unsolicited advertisements to a telephone facsimile machine, in violation of the TCPA, 47 U.S.C. §227(b)(1)(C).

35. On information and belief, these unsolicited advertisements were transmitted *en masse* without the prior express consent of Plaintiff and Class One.

36. As a result of Defendants' unlawful conduct, Plaintiff and Class One suffered actual damages and, under Section 227(b)(3), are entitled to recover for actual monetary loss from such a violation, or to receive at least \$500 in damages for each such violation, whichever is greater, or both such actions.

COUNT II

Insufficient Opt-out Notice in Violation of the TCPA, 47 U.S.C. § 227(b)(2)(D)
(On Behalf of Class Two)
(In the Alternative to Class One)

37. Plaintiff incorporates by reference paragraphs 1-32, except as otherwise stated herein.

38. In the alternative to Class One and assuming Plaintiff and Class Two consented to receive facsimile advertisements from or had an established business relationship with Defendants, Defendants' faxes violate the TCPA because they fail to satisfy all of the opt-out notice requirements under § 227(b)(2)(D).¹ Specifically, the notice does not:

¹ *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 683 (7th Cir. 2013), *reh'g denied* (Sept. 24, 2013), *cert. denied sub nom. Turza v. Holtzman*, 134 S. Ct. 1318 (2014) ("Even when the [TCPA] permits fax ads – as it does to persons who have consented to receive them, or to those who have established business

- a. appear clearly and conspicuously on the first page of the fax, as required by § 227(b)(2)(D)(i);
- b. state that the sender's failure to comply with an opt-out request within the shortest time reasonable is unlawful, as required by § 227(b)(2)(D)(ii);
- c. set forth the elements of a valid opt-out request, as required by § 227(b)(2)(D)(iii);
- d. include a domestic telephone and fax number for the recipient to submit an opt-out request, as required by § 227(b)(2)(D)(iv)(I); and
- e. comply with the technical requirements of § 227(d), as required by § 227(b)(2)(D)(vi).

39. As a result of Defendants' unlawful conduct, Plaintiff and Class Two suffered actual damages and, under Section 227(b)(3), are entitled to recover for actual monetary loss from such violations, or to receive at least \$500 in damages for each such violation, whichever is greater, or both such actions.

COUNT III
Conversion
(On Behalf of Class One)

40. Plaintiff incorporates by reference paragraphs 1-32 as if fully set forth herein.
41. By sending unsolicited faxes to Plaintiff and the other Class One members, Defendants converted to their own use Plaintiff's and the other Class One members' fax machines.
42. Plaintiff's and the other Class One members' fax machines were used to receive the unsolicited faxes.
43. This loss of use constitutes an asset of economic value paid for by Plaintiff and the other Class One members when they acquired their fax machines.

relations with the sender – the fax must tell the recipient how to stop receiving future messages.”) (citing the opt-out provisions of the TCPA).

44. Immediately prior to the sending of the unsolicited faxes, Plaintiff and the Class One members owned and had an unqualified and immediate right to the possession of their fax machines.

45. By sending the unsolicited faxes, Defendants appropriated to their own use Plaintiff's and the Class One's fax machines in such manner as to make them unusable.

46. Furthermore, Plaintiff's and Class One's fax machines suffered wear and tear when they were appropriated by Defendants to receive their unsolicited faxes.

47. Such appropriation was wrongful and without authorization.

48. Defendants knew or should have known that such appropriation of Plaintiff's and Class One's fax machines was wrongful and without authorization.

49. Defendants deprived Plaintiff and the other Class One members of the performance of their fax machines.

50. Accordingly, Plaintiff and the other Class One members suffered damages as a result of receipt of the unsolicited faxes.

VI. JURY DEMAND

Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiff demands a trial by jury of all claims in this Complaint so triable.

VII. REQUEST FOR RELIEF

WHEREFORE, Plaintiff Grok Lines, Inc., individually and on behalf of the Class, requests that the Court enter an Order as follows:

- A. Certifying the Class as defined above, appointing Plaintiff Grok Lines, Inc. as the representative of the Class, and appointing its counsel as Class Counsel;
- B. Awarding actual and statutory damages;

- C. Enjoining Defendants Financial Carrier Services, Inc. and Electronic Funds Source, LLC from sending unsolicited facsimile advertisements with deficient opt-out notices;
- D. Awarding of reasonable attorneys' fees and costs; and
- E. Awarding such other and further relief that the Court deems reasonable and just.

Dated: January 29, 2015

Respectfully submitted,

GROK LINES, INC., individually and on
behalf of all others similarly situated

By: s/ Joseph J. Siprut

One of the Attorneys for Plaintiff
And the Proposed Putative Class

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4826-2535-7857, v. 1

EXHIBIT A

FAX**Date:** 04/11/2014**Pages including cover sheet:** 4

To:	8884953304@rcfax.com
Phone	
Fax Number	+18884953304

From:	Jamie FCS
	NN
Phone	(866) 875-2208 * 123
Fax Number	(866) 875-2208

NOTE:



Financial Carrier Services, Inc.

Hello!

Sorry I missed you regarding our factoring service at Financial Carrier Services. Allowing us to purchase your receivables will get you your money quick, while maximizing your operating capital and free time, so you can focus on your business!

Why partner with FCS?

- **Same day funding off faxed or scanned copies** and now send invoices and paperwork with **TRANSFLO EXPRESS** and **TRANSFLO \$VELOCITY!**
- **We beat any competitor's rate!** Rates as low at **.9%!**
- **Broker quick pay match!** If a broker's rate is lower than your rate, **we will match it!**
- **Free Setup!**
- **No long-term contract!**
- **50% fuel advances!**
- **Our EFS Fuel Card program!**
- **Fuel discounts up to \$0.50+ off per gallon!**
- **Free online credit check!**
- **We help you pay for your tags!**
- **Equipment financing with no credit check!**
- **And last, but not least, our friendly and personalized customer service!**

I am looking forward to speaking with you ☺

Best Regards!

Jamie Gardner

jamie@carrierfs.com

Phone: 866-899-7080 ext. 2009

Fax: 888-295-5256

Monday – Friday 8:30 am - 5:30 pm

Follow our new [Blog](#) [Trucking Tribune](#) ☺





Financial Carrier Services, Inc.

FACTORING APPLICATION

Fax back to **888.295.5256** ASAP for processing Attention: Jamie

Company Name _____ MC# _____ Primary Phone _____
 Contact(s) _____ Secondary Phone _____
 Business Address (w/city, state, zip) _____
 Date Established _____ Fax # _____
 Type of Freight _____ Type of Equipment – Truck(s)/Trailer(s) _____
 # of trucks _____ Email Address _____ Are you currently Factoring: Y / N

Owners and Officers (must have info for each individual – add extra paper if needed)

Name _____ Home Address _____
 % Ownership _____ SSN _____ Married? Y / N
 DOB _____ Do you have a CDL? Y / N DL# _____
 Are you a primary company driver? Y / N Personal Contact Number _____
 Please list any additional companies you have ownership in _____

Account and Company Information

Annual Sales _____ Outstanding A/R _____ Average Invoice Amount _____
 # of Customers _____ Payment Terms with Customers _____ High Credit _____
 What is your requested Line Of Credit? _____

The information regarding this application is true and accurate to the best of my information and belief. This serves as my permission for the release of any information regarding this application for the purposes of credit and background investigation including but not limited to commercial credit and consumer credit reports on the individuals listed on this application as an officer or principal of the company applying, and confirm my understanding that this application constitutes a contractual agreement, and holds applicant responsible for any fees incurred during the sign up process, including but not limited to due diligence and filing. The undersigned further hereby consent(s) to Financial Carrier Services use of a non-business consumer report on the undersigned in order to further evaluate the creditworthiness of the undersigned as principal(s) proprietor(s) and/or guarantor(s) in connection with the extension of business credit as contemplated by this factoring application. The undersigned hereby authorizes Financial Carrier Services to utilize a consumer credit report on the undersigned from time to time in connection with the extension or continuation of the business credit represented by this factoring application. The undersigned as (an) individual(s) hereby knowingly consent(s) to the use of such report consistent with the Federal Fair Credit Reporting Act as contained in 15 U.S.C. @1681 et seq. I/ Financial Carrier Services understand that submission of this application does not commit Financial Carrier Services to provide any financial services.

Owners Signature (all owners must sign)

Signature (1) _____ Signature (2) _____
 Name Printed (1) _____ Name Printed (2) _____
 Title/Date (1) _____ Title/Date (2) _____

How did you hear about FCS? Jamie called me!

Current Photo ID of each Officer and Owner, MC Authority, and a completed W9 must be included with Application



The Financial Carrier Service card, powered by EFS, is accepted nationwide and throughout Canada at more than 6,400 locations and includes fuel discounts at over 1,600 stops, including all major truck stop chains and independents - with no minimum usage requirements.

FCS customers are entitled to **cost plus pricing** from about 400 truck stops across the country, highlighted by our AMBEST member locations. It will also include cost plus pricing from Sapp Brothers, Wilco Hess, Quick Fuel and Kangaroo Express locations.

In addition, FCS customers receive **1 – 2 cents per gallon** at over 1200 locations including Love's, Pilot/FJ, TA/Petro and a host of independent truck stops.

Transaction fees are competitive: **\$1.99** for fuel purchases and **\$2.75** on Cash Only transactions and for EFS Transchecks up to a \$1,500 face value.

FCS Fuel Card & Transcheck Rates

In & Out-of-Network Fuel Card Transaction *	\$1.99
In & Out-of-Network Fuel Card with Cash	\$1.99
Cash Only	\$2.75
Transchecks to \$1,500	\$2.75
Monthly Maintenance Fee *	\$0.00

*** Ways to Save!**

There are no additional fees on products and services made by the same card, for one hour following a diesel purchase, at the location of the diesel purchase

The \$7.95 Shipping Fee is applied to future supply orders. We do not charge this fee for initial welcome kits, which contain sufficient supplies for at least 6 months to a year.

When supplies are needed, many customers request a 'bulk' order (cards, checks and CARs) as the \$7.95 fee will cover the entire supply order, hopefully lasting another 6 months to a year.

- Universal acceptance at more than 6,400 Truck Stops in the U.S. and Canada, including Flying J®, Love's®, Petro®, Pilot® and T/A®
- Over 1,600 independents and major chains offer point of sale Fuel discounts, without a volume requirement
- Online Card Maintenance and Account Management tools including reporting and fuel pricing, at no cost
- Online access to over 35,000 repair facilities
- Interfaces to most third-party software providers
- No minimum commitments
- Customer-tailored card purchase power
- Low, simple transaction fees
- No additional fees for account set up or monthly maintenance
- Customer Service is available 24/7 and free of charge
- TransChecks are a quick and easy way to send money anywhere, anytime
- Regulatory compliance services, such as Fuel Tax processing and Driver Log Auditing are available separately

To establish your Financial Carrier Service Fuel Card account, just sign the Customer Agreement (1, 6, 8 & 9) where indicated and sent those pages by email: amber.white@efslc.com or fax: 901.380.8232. If you have any questions, please contact Amber White directly at: 901.474.0835.